SUPREME COURT, U.S.
AUG 25 1993
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

DEREK SMITH, PATRICK O'CONNOR,
LUKE MARONE, KRISTI HANDLER,
ELIZABETH BAIRD, NICOLE RICHARDS,
PATRICK V. GIBBONS, FRANCES GIBBONS,
FRANCIS McMANUS, MARK J. FARLEY,
GARY J. FARLEY, ANNA FISHER,
Petitioners

v.

LOWER MERION TOWNSHIP,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Michael J. Malloy, Esquire
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Media, PA 19063
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August 24, 1993

QUESTIONS PRESENTED FOR REVIEW

1. Whether Lower Merion Township Ordinance No. 3199, the Student Housing Ordinance, violates the Equal Protection Clause of the United States Constitution because "students" require a special exception to live together in "student homes" when other, non-"student" individuals are permitted to live together without government interference.

2. Whether Lower Merion Township Ordinance No. 3199, the Student Housing Ordinance, violates the Equal Protection Clause of the United States Constitution because the distinctions and classifications which the Ordinance draws are not rationally related to the Township's stated, legitimate goal.

LIST OF PARTIES

The parties to the proceedings below were Petitioners, Derek Smith, Patrick O'Connor, Luke Marone, Kristi Handler, Elizabeth Baird, Nicole Richards, Patrick V. Gibbons, Frances Gibbons, Francis McManus, Mark J. Farley, Gary J. Farley and Anna Fisher. Respondent, Lower Merion Township was defendant-appellee below.

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1992

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCES GIBBONS, FRANCIS McMANUS, MARK J. FARLEY, GARY J. FARLEY, ANNA FISHER,
Petitioners

vs.

LOWER MERION TOWNSHIP,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioners respectfully request that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered on May 27, 1993.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third

Circuit is set forth in full in the Appendix at page App. 1 of this Petition.

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania is set forth in full in the Appendix at page App. 4 of this Petition.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 27, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment Fourteen, which provides:

> All person born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U.S.C. §1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia.

3. Lower Merion Township Ordinance No. 3199, which is set forth in full in the Appendix at App. 23 of this Petition.

STATEMENT OF THE CASE

This case presents an important issue regarding the ability of a municipality to use its police power of zoning to restrict the residence of a politically unpopular group of individuals, when other, similarly situated individuals are not so restricted.

On July 19, 1990, the Township of Lower Merion, Pennsylvania ("the Township") enacted Ordinance No. 3199 ("the Ordinance") which amended the Township's Zoning Ordinance.

The Ordinance permitted "student homes" to be located in residential areas only if permitted by a special exception. A "student home" was defined by the Ordinance as:

> A living arrangement for students, unrelated by blood, marriage or legal adoption, attending or about to attend a college or university or who are on a semester or summer break from studies at a college or university, or any

combination of such persons. Student homes shall not include fraternities, sororities or community residential programs.

See Ordinance, §1, (App. 26). "Student" is not defined by the Ordinance.

Under the Ordinance, a "student" may not reside with another non-related "student" unless their "student home" obtained a special exception. Pursuant to the Ordinance, a special exception may be obtained for a "student home" only if the residence houses "no more than three (3) students" and is "located in a dwelling with a floor area of at least on thousand five hundred (1500) square feet, exclusive of basements, garages and accessory buildings." A "student home" is not permitted if located within five hundred (500) feet of another "student home" or other "residential use" as defined by the Ordinance, except in R-7 areas. "student

homes" are not permitted in structures designed as townhouses. See, Ordinance §3 (p.14a). Finally, a "student home" must have three (3) off-street parking spaces for each "student home" occupying a premises. See, Ordinance §4 (App. 32).

The Petitioners herein are various university students who rent residential accommodations in the Township and, also, various landlords who rent living accommodations to university students in the Township. These students and landlords have been cited for violating the Ordinance.

On November 27, 1990, Petitioners filed a Complaint in the United States District Court for the Eastern District of Pennsylvania alleging that the terms of the Ordinance, as well as the manner of its enforcement, violated their Civil Rights

under the Equal Protection and Due Process Clauses of the United States Constitution.[1]

These Constitutional claims were brought pursuant to 42 U.S.C. §1983. They sought injunctive relief, compensatory damages, punitive damages, and attorneys' fees.[2]

Petitioners later sought certification as a class of those students and landlords aggrieved by the Ordinance. By Order of October 3, 1991, the Honorable Robert S. Gawthrop, III, refused to certify the class proposed by the aggrieved individuals.

Cross Motions for Summary Judgment were subsequently filed by the parties and,

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[1]Petitioners also alleged a violation of their Right to Travel, the Fair Housing Act, and conspiracy to violate all these rights. These claims were all withdrawn or dismissed.

[2]The claim for punitive damages was eventually dismissed.

on May 7, 1992, Judge Gawthrop granted Summary Judgment to the Township. See, Memorandum and Order, App. 4).

The Petitioners filed a timely appeal to the United States Circuit Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1291. Oral argument was heard before a three judge panel on May 19, 1993 and, on May 27, 1993, the Order of the District Court was affirmed by the Judgment Order of Circuit Judge Seitz. (See, Judgment Order, App 1).

ARGUMENT FOR GRANTING THE WRIT

This case presents an important issue to the Court regarding the ability of a municipality to use its police power of zoning to restrict the residency in their town of a politically unpopular group of individuals, namely, college "students."

It is yet another step down the "slippery slope" of land use cases wherein a municipality attempts to use its Zoning Ordinance to exclude politically unpopular persons. Petitioners believe that the Court should, as it did in the cases of City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) and Moore v. City of East Cleveland, 431 U.S. 94 (1977), overturn a Zoning Ordinance when it seeks to control too harshly who may, and who may not, live together.

An equally important issue for this Court to address is how the rational basis standard of review should be applied to the Petitioners' Equal Protection Claim and others like it. In the Cleburne decision, the Court, in using the rational basis standard of review to analyze the plaintiff's Equal Protection Claim, clearly

applied a more active or exacting rational basis analysis that had been traditionally used previously. However, the Court also very clearly declined to place handicapped persons in a "quasi-suspect" class and declined to enunciate any type of heightened scrutiny in such cases. Cleburne, 473 U.S. at 446. Since the Cleburne decision, some Courts have adopted this more "active", "exacting" or "searching" rational basis standard while others have not.

The Third Circuit Court of Appeals declined, in adopting the Memorandum of the District Court, to utilize this Cleburne review in this case. This, despite the fact the Third Circuit had apparently already utilized and adopted it in a

previous case.[3]

The fear of Justice Marshall (who was joined by Justices Brennan and Blackmun, concurring in part and dissenting in part in Cleburne), that:

> ...by failing to articulate the factors that justify today's "second order" rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower Courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny.

473 U.S. at 460, has apparently been realized, at least in the Third Circuit Court of Appeals and the District Court for the Eastern District of Pennsylvania.

It is the Petitioners' argument that the Court need not extend or enlarge the

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[3]See, Sullivan v. City of Pittsburgh, Pennsylvania, 811 F.2d 171, 184 (3rd. Cir., 1987).

sphere of cases to which the Cleburne rational basis analysis applies in order for Petitioners' claim to be so analyzed. It is the Petitioners' belief that this analysis applies to all cases wherein legislation is challenged as denying the equal protection of the laws.

I. THE RATIONAL REVIEW STANDARD UTILIZED IN CLEBURNE IS THE PROPER REVIEW STANDARD TO BE UTILIZED IN DECIDING THIS CASE.

The Petitioners do not make any claim, nor did they in the lower courts, that their claim deserved any type of heightened scrutiny. The Petitioners have always known and argued that the rational basis standard of review applies to their case. Where the Petitioners take issue with the lower courts is whether or not those courts correctly applied the rational basis standard of review, most recently applied by this Court in City of Cleburne, Texas v.

Cleburne Living Center, supra, which now requires a more exacting or searching analysis. In Cleburne, the Court stated the general rule that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. 473 U.S. at 440. The Court also stated that the state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. 473 U.S. at 446. The Court then extended its analysis, in determining whether or not the classification drawn was rationally related, to decide whether those included in the classification (the mentally retarded) who would live in the home would threaten legitimate interests of the city in a way that other permitted uses, such as

boarding houses and hospitals would not. The Court in Cleburne concluded that there was no rational basis for believing that the home for the mentally retarded posed any special threat to the city's legitimate interests, therefore, holding the Ordinance invalid. It is this further "search" into whether or not the classifications drawn by the Ordinance ("students" and "student homes") are rationally related to the Township's legitimate purposes which Petitioners seek.

The Cleburne analysis has been adopted and utilized in many circuits and district courts. See, Sullivan v. City of Pittsburgh, Pennsylvania, 811 F.2d 171 (3d. Cir., 1987); Brennan v. Stewart, 834 F.2d 1248 (5th Cir., 1988); Bannum, Inc. v. City of Louisville, Kentucky, 958 F.2d 1354 (6th Cir., 1992); Cornerstone Bible Church v.

City of Hastings, 948 F.2d 464 (8th Cir., 1991); Executive 100, Inc. v. Martin County, 922 F.2d 1536 (11th Cir., 1991); Alamo Rent-A-Car v. Sarasota-Manatee Airport Authority, 825 F.2d 367 (11th Cir., 1987); Burstyn v. City of Miami Beach; 663 F.Supp. 528 (S.D. Fla., 1987); Love Church v. City of Evanston, 671 F.Supp. 515 (N.D. Ill. 1987); Cohen v. City of Des Plaines, 742 F.Supp. 458 (N.D. Ill. 1990). The wide acceptance of this more searching analysis, drawn from this Court, mandates that it be used in analyzing Petitioners' claim.

The District Court and the Circuit Court of Appeals, in adopting the District Court's Memorandum, failed to apply the rational basis review correctly. Judge Gawthrop in his Memorandum, when analyzing the Petitioners' argument for the use of the Cleburne review, recognized that

Cleburne dealt with the mentally retarded and in this case, "there is no showing that college students generally, or those attending local colleges in particular, are members of a class toward which society has been, historically or irrationally, prejudiced." Judge Gawthrop thus concluded that, "the precondition for heightened scrutiny is not met." See, App. 14. The Petitioners believe that Judge Gawthrop erred in deciding that any preconditions of previous prejudice are necessary for the Cleburne review to be utilized.

Judge Gawthrop used the extremely lenient standard outlined in United States v. Carolene Products Co., 304 U.S. 144 (1938), that if a legislative determination is "at least debatable," the court should uphold it. He concluded that, "The means and ends of the Township's Zoning

Ordinance, although troubling in certain respects, are "at least debatable" in the language of Carolene. See, App. 16, 17, and thus upheld the Ordinance. The Petitioners argue that since Cleburne, governments are asked to be more accountable for the goals and means of their laws than just showing they are "debatable."

II. AN ANALYSIS OF THE ORDINANCE UTILIZING THE CLEBURNE RATIONAL BASIS ANALYSIS SHOULD LEAD THIS COURT TO CONCLUDE THAT THE ORDINANCE VIOLATES THE PETITIONERS' RIGHT OF EQUAL PROTECTION OF THE LAWS.

The issue in the present case must mirror that of Cleburne and its progeny: may the Township require a special exception for "students" to live together in "student homes" when other, non-"student" individuals are permitted to live together without government interference?

The petitioners believe that this Court would find that there is not any legitimate reason to distinguish between two, non-related students who live together and two, non-related nurses, two plumbers, two lawyers, two "bikers", or two of any other type occupation.

The Township would argue that it drew its "student" distinction because it received complaints from local residents about "student homes" and students' activities, including making noise late at night, urinating on lawns and bushes and monopolizing the available parking spaces on the streets. The Township has assumed that "students" as a group are more vulgar, louder and more violent than other types of persons. Nevertheless, when the Township canvassed the affected neighborhoods to determine the extent of the perceived

problem during its "Community Harmony Program," only about 5% of those residents requested had any specific problems with students or student residences. The remainder of the residents expressed no ill feelings towards the students and, indeed, 5% of them stated that the students were an asset to the community. This empirical data was ignored by the Committee charged with drafting the Ordinance. The Township Commissioner who was Chairman of that Committee, in deposition testimony, frankly admitted that the sole basis for the enactment of the Ordinance was the "vociferous" complaints of certain residents and that, if no complaints had been received, no Ordinance would have been adopted. The deposition of one local resident who played a prominent and vocal role during the Ordinance adoption process

magnified the Township's irrational basis for distinguishing "students" from others. His problem with "students" and "student houses" in his neighborhood was that the lifestyle of students differs from the lifestyle of a "typical resident" of the neighborhood, and that he would have no problems with having students in his neighborhood as long as those students shared his values.

The irrationality of distinguishing between students and other non-related renters can best be shown by hypothetical example. The situation may exist where a landlord owns attached twin homes in a residential district of the townships and rents each home to two sets of tenants. One of the homes is rented to three, twenty year old persons who are classified by the Township as "students", while the other

home is leased to three plumbers of the same age. The outward appearances of the homes is the same and both are maintained by the landlords.

Even though neither group of tenants causes any more neighborhood disruptions or traffic problems than the other, the Ordinance would require that the students be evicted if they do not obtain a special exception. Indeed, even if the students cause absolutely no problem and the plumbers require a police presence every Friday night, the Ordinance would require the students to be evicted and permit the plumbers to stay.

The Township would argue that the draconian measure of banning "student homes" from residential districts is necessary to maintain their admittedly legitimate government goal of maintaining

peaceful, residential neighborhoods. The Petitioners do not deny that the stated goal is legitimate, however, it is simply not rational to single out "students" for treatment which is different from that given to other, non-student renters. To do so is to violate the mandate of Cleburne since students do not threaten legitimate interests of the Township in a way that other permitted uses would not.

The irrationality of the Ordinance can also be seen in the example where individuals, prohibited from living together while "students", either drop out or graduate. Once this happens, they are now permitted to reside together even though, presumably their "values" or anit-social behavior have not changed overnight, and they still take up the same amount of parking spaces. This change in

classification of the individual has no affect whatsoever on the Township's goal of maintaining the neighborhood.

The Petitioners are left to believe, and would argue to the Court, that the basis for the Ordinance was the unsubstantiated fears and prejudices of the neighborhood because of the isolated, rowdy behavior of some "students." However, objectives such as a bare desire to harm a politically unpopular group are not legitimate state interest. Cleburne, 473 U.S. at 447. Mere negative attitudes, or fear unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible basis for the classification drawn. Id. at 448.

CONCLUSION

For all of the above-stated reasons,

this Court should grant Petitioners' Writ of Certiorari.

Respectfully submitted,

MICHAEL J. MALLOY, ESQUIRE
Attorney for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1717

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCES GIBBONS, FRANCIS A. McMANUS, MARK J. FARLEY, GARY J. FARLEY, ANNA FISCHER, THOMAS PIERSALL, FRANCIS PEZZI, ANTHONY MISELLI, Individually and for all similarly situated individuals

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCES GIBBONS, FRANCIS A. McMANUS, MARK J. FARLEY, GARY J. FARLEY and ANNA FISHER, Individually and for all similarly situated individuals,

APPELLANTS

v.

LOWER MERION TOWNSHIP

Appeal from the United States District Court for the Eastern District of Pennsylvania
(Civil Action No. 90-07501)

District Judge: Honorable Robert S. Gawthrop, III

Argued May 19, 1993

BEFORE: STAPLETON, ALITO and
SEITZ, Circuit Judges.

JUDGMENT ORDER

Plaintiffs appeal from the order of the district court granting defendant summary judgment.

Essentially for the reasons given in the Memorandum of the district court dated May 7, 1992, and in particular because the court believes the rational basis standard is applicable here and supports, in part, the legitimate desire of the defendant to protect the residential character of the neighborhood by enacting the ordinance in dispute, it is

ADJUDGED and ORDERED that the order of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT:

_____
Circuit Judge

ATTEST:

_____
P. Douglas Sisk
Clerk

Dated: May 27, 1993

Costs taxed in favor of the appellee as follows:

Brief.....$150.50

Certified as a true copy and issued in lieu of a formal mandate on June 18, 1993

Teste: _____

Clerk, United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCIS GIBBONS FRANCIS GIBBONS, FRANCIS A. McMANUS MARK J. FARLEY, GARY J. FARLEY, ANNA FISHER, Plaintiffs	:	CIVIL ACT
v.	:	
LOWER MERION TOWNSHIP Defendant	:	NO. 90-750

Gawthrop, J. May 7th, 1992

MEMORANDUM AND ORDER

Plaintiffs Mark J. and Gary J. Farley, owners of rental property in defendant township, have filed for a preliminary injunction and temporary restraining order, in this case challenging to the constitutionality of a zoning ordinance restricting rentals to students. Also pending before the court, are the parties'

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cross-motions for summary judgment, with extensive documentation, which they incorporated into their briefs and during the hearing and argument on the Farleys' motion for a preliminary injunction.

BACKGROUND

In 1988, the Board of Commissioners of Lower Merion Township, Montgomery County, established a Residential Preservation Committee. The Committee held public meetings on preservation of the residential character of the community, during which citizens complained about the disruption caused by the student tenants in the township. The residents raised familiar town-and-gown problems: excessive noise, partying in the evening and early-morning hours, inadequate on-street parking, unsafe and drunk driving, underage drinking, urinating and vomiting in public, profuse littering. (Def.Mot. for Sum.J. at 3-4).

Residents were also upset that landlord-investors were buying up properties to rent to students, thus driving up property values, pricing middle-class families out of the local housing market, and changing the character of their community. (Id., at 4).

After holding hearings and considering the findings of the Residential Preservation Committee, the testimony of students, professors and township residents, the police records on student housing problems, information from the Zoning Enforcement Officer, complaints from their individual constituents, and the Commissioners' personal experience, (Id. at 6), the Board of Commissioners, on February 15, 1989, adopted an ordinance, amended on July 19, 1990, which, in essence, prohibits renting a property to a group of more than three students in a residential zoning

district without a special exception from the zoning board.[1] Excluded are

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[1]Ordinance No. 3199 reads in pertinent part: "An ordinance to amend the code of the Township of Lower Merion by redefining the terms, Family, Community Residential Program and Student Home by redefining the term "group home" as a Community Residential Program...

§1. STUDENT HOME - A living arrangement for students, unrelated by blood, marriage or legal adoption, attending or about to attend a college or university or who are on a semester or summer break from studies a [sic] college or university, or any combination of such persons. Student homes shall not include fraternities, sororities, or community residential programs.
§3. Zoning, Article IV. RAA Residence Districts §155-11, Use Regulations, shall be amended by adding thereto new subsections Q through U to read as follows:

S. The following uses when authorized as a special exception:

...

(5) Student home for no more than three (3) students located in a dwelling with a floor area of at least one thousand five hundred (1500) square feet, exclusive of basements, garages, and accessory buildings. A special exception authorizing a student home shall expire without further action by the Township unless the use is registered in conformity with Title 92 of the

fraternities, sororities, community residential programs, and students who are related by consanguinity or affinity.

The plaintiffs assert that the ordinance violates their constitutional rights to due process and equal protection, under the Fourteenth Amendment to the Constitution, thus falling under the

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Lower Merion Code.

T. No residential use authorized under subsections Q, R or S above shall be permitted if another residential use listed in those subsections is located in any Residential Zoning District except R-7 ... Student homes shall also be subject to the spacing provisions of 155-141.3.

U. In districts which have more than a single set of area and width regulations, community residential programs and student homes shall meet the area and width regulations for single-family dwellings, except that student homes are not permitted in structures designed as townhouses.

W. Student homes three (3) parking spaces for each student home occupying a premises.

statutory aegis of 42 U.S.C. §1983 and the Fair Housing Act, 42 U.S.C. §3601, et seq.

The Farleys, who now seek a preliminary injunction, allege that to comply with the ordinance, they have been forced to turn away prospective student-tenants and have, after diligent effort, be unable to find other tenants. They assert that the ordinance has caused irreparable harm to their rental business that is quickly bringing them to financial ruin; they have fallen behind in their mortgage payments; their credit rating has eroded; they have sold some of their holdings and refinanced their own homes; they say that they may even face bankruptcy because of the restrictions the township has placed on the rental properties. (Pl.Mot. for Prelim.Inj.)

These past and imminent harms to plaintiffs are considerable indeed. A

preliminary injunction, however, is an extraordinary remedy, not to be granted lightly.

DISCUSSION

An injunction may only be granted if plaintiff can demonstrate (1) a reasonable probability of eventual success in the litigation, (2) irreparably harm if relief is not granted pendente lite; taking into account (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. Chez Sez III Corp. v. Township of Union, 945 F.2d 628, 634 (3d Cir. 1991).

Likelihood of Success on the Merits

When a federal court sits in judgment of a local municipality's legislative act, it owes the municipality a certain amount of deference in its determination of local needs and preferences. Minnesota v. Clover

Leaf Creamery Co., 449 U.S. 456, 469 (1981). Thus, these legislative acts enjoy a "presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." Hodel v. Indiana, 452 U.S. 314, 331-332 (1981). This is a difficult presumption to overcome.

Zoning ordinances are to be upheld unless they are "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals of general welfare." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 385 (1926). The Supreme Court has further articulated the legitimate purposes of zoning ordinances, holding that "[t]he preservation of the character and integrity of single-family neighborhoods, prevention of undue concentration of population, prevention of traffic congestion and

maintenance of property values are all legitimate purposes of planning and zoning." Village of Belle Terre v. Borras, 416 U.S. 1, 9 (1974). The Lower Merion Zoning ordinance seeks to maintain the residential character of the community, to cut down on noise and congestion, an to maintain property values. Thus, defendants have articulated a constitutionally permissible purpose, similar to that upheld in Belle Terre.

What remains to be answered is whether the ordinance is rationally related to that end, whether the ordinance impermissible burdens any of plaintiffs' fundamental constitutional rights, and whether the ordinance is so vague as to violate due process.

a. Standard or Review - Rationality

Plaintiffs argue that the ordinance discriminates against students, in

violation the equal protection clause, and thus, that the ordinance should be subject to a more demanding standard of review. Not every discriminatory classification, however, is a violation of the equal protection clause. Only discrimination based on a limited, well recognized set of suspect classifications triggers heightened scrutiny. The parties agree that the Supreme Court has not recognized college students as a suspect classification.

Plaintiffs, nevertheless, urge some form of heightened-scrutiny review, relying upon City of Cleburne v. Cleburne Living Center, 473 U.S. 432-439 (1985). There, the Supreme Court, although concluding that a classification based on the attribute of mental retardation is not suspect, did say that because of the past and continuing prejudice in our society toward the mentally retarded, the city's zoning

ordinance, which discriminated against the mentally retarded, warranted heightened scrutiny. Here, there is no showing that college students generally, or those attending local colleges in particular, are members of a class toward which society has been, historically or irrationally, prejudices. Thus, the precondition for heightened scrutiny is not met.

Nor have plaintiffs been able to show that this zoning ordinance would unconstitutionally burden a specific liberty interest, recognized for protection under the due process clause of the Fourteenth Amendment. Thus, the ordinance is not subject to heightened scrutiny for unconstitutionally burdening the plaintiffs' rights.

Since there is no basis for heightened scrutiny under either the equal protection or the due process clauses, the ordinance

is subject to rationality review.

Rationality review is "lenient." Exxon Corporation v. Eagerton, 462 U.S. 176, 195 (1983). An ordinance must be upheld if facts "reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). Here, facts can not only be conceived to justify the ordinance, the Township sought and compiled such facts, by conducting fact-finding meetings, holding hearings, and giving students, residents, and landlords an opportunity to be heard. The Township's investigation of the complaints showed that large concentrations of student-tenants do, in fact, change the character of the neighborhood and cause traffic and parking problems, in ways that other smaller groups of tenants with less free time and different social customs do not. Thus, the defendant says, it was rational to

restrict, without not totally eliminating, the areas where students could rent housing in the Township.

If a legislative determination is "at least debatable," the court should uphold it. United States v. Carolene Products Co., 304 U.S. 144, 153-54 (1938). The Township's experience and investigation showed that the student-tenants were changing the character of the community and undermining the general welfare of the Township. The township was well aware of the economic hardships to landlords and inconvenience to students, primarily from Villanova University, where on-campus housing is scarce. (Board of Commissioners, Lower Merion Township, Three Public Hearings, June 20, 1990, at 23, 36, 56, 73, 85, 98, 101.). It nevertheless decided to regulate the location of student rental properties. The means and ends of

the Township's zoning ordinance, although troubling in certain respects, are "at least debatable" in the language of Carolene, supra. Concededly, that is not the most stringent of standards. But that is the standard and has been for well over a half century. It has here been met. A district court may not substitute its own judgment as to the wisdom or utility of a legislative purpose for that of local legislatures. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981). I am, thus, constrained to conclude that the ordinance is rationally related to a legitimate government interest.

b. Vagueness

Plaintiffs challenge the ordinance on another ground as well: vagueness. Specifically, they assert that it is impermissible vague in the broad spectrum of potentially included people, who may be

happening to be studying something, and are thus students. Where no suspect class or fundamental right is encumbered, economic regulations, such as zoning ordinances, need not be narrowly tailored. Papachristou v. City of Jacksonville, 405 U.S. 156, 162; Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). To succumb to a facial challenge to its constitutionality, the ordinance must be "incapable of any valid application." Here, admittedly, the application of the ordinance in close cases could cause some problems of interpretation. For example, a group of three unrelated adults, working full-time during the day and attending law school at night, or some other adult night school at the local community college for a couple of hours a week, could be seen as falling within an uncertain gray area. But as

applied to the plaintiffs at bar, this problem of interpretation has not arisen. All the student-tenants at the time the suits was instituted were attending college full-time. (Dep. D. Smith at 5, O'Connor at 5-7; Handler at 6-8; Baird at 4-5; Marrone 4-14; 36; Richards 7-11; P. Gibbons at 23-26, 61-62; M. Farley at 19-20). The statute is not so vague as to have no valid application. The statute is not so vague as to have no valid application. The statute is directed at those whose primary occupation is student and aimed primarily at students enrolled full-time at Villanova University, with which Township officials had numerous meetings to address the problem of student housing. (Dep. Drayer, at 34; Manko, at 19). The word "student," when construed in its ordinary meaning and in light of the legislative history, beyond consistent interpretation. (See Board of

Commissioners, Lower Merion township, Three Public Hearings, June 20, 1990, at 101, 121; Dep. Drayer, at 34; Dep. Duncan, at 19). Thus, the ordinance is not void for vagueness on its face or as applied.

CONCLUSION

Because the zoning ordinance has withstood plaintiffs' challenges to its constitutionality, plaintiffs do not have a reasonable probability of succeeding on the merits. Therefore, plaintiffs' motion for preliminary injunction must be denied. In addition, since, as a matter of constitutional law, I have concluded that plaintiffs' challenges cannot succeed, I shall also grant summary judgment to defendant.

An order follows

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCIS GIBBONS FRANCIS GIBBONS, FRANCIS A. McMANUS MARK J. FARLEY, GARY J. FARLEY, ANNA FISHER, Plaintiffs	:	CIVIL ACTION
v.	:	
LOWER MERION TOWNSHIP Defendant	:	NO. 90-7501

ORDER

AND NOW, this 7th day of May, 1992, upon consideration of Plaintiffs' Mark and Gary Farleys' Motion for Preliminary Injunction and Temporary Restraining Order, and the response thereto, and after hearing and argument in open court, it is ORDERED that Plaintiffs' motion is DENIED;

IT IS FURTHER ORDERED, upon consideration of the parties' Cross-Motions

for Summary Judgment, under Fed.R.Civ.P., 56(c), and the responses thereto, that summary judgment is GRANTED for the defendant;

IT IS FURTHER ORDERED, that defendant's Motion to Strike Expert Report, and plaintiff's Motion to Strike Motion for Summary Judgment (Docket Item No. 52) are DENIED as MOOT.

BY THE COURT:

_____

Robert S. Gawthrop, III J.

AN ORDINANCE
NO. 3199

AN ORDINANCE TO AMEND the Code of the Township of Lower Merion by redefining the terms Family, Community Residential Program and Student Home by redefining the term "group home" as a Community Residential Program; by providing for Community Residential Programs in Residence Districts; by imposing uniform separation requirements on the following uses permitted in Residence Districts, except the R-7 Residential Zoning District: community residential program, alternative housing options for the elderly, club or lodge, fraternity or sorority, private educational institution, religious use, student home, home daycare; by altering parking requirements for uses including non-recreational club or lodge, fraternity, sorority, community residential program,

convalescent home, nursing home and home for the aged, and deleting provisions inconsistent with the above.

The Board of Commissioners of the Township of Lower Merion hereby ordains:

Section 1. The Code of the Township of Lower Merion, Chapter 155 thereof, entitled Zoning, Section 155-4(B), Definitions, the definition of Family, Group Home and Student Home, shall be amended to provide as follows:

> FAMILY - Any number of individuals living and cooking together as a single housekeeping unit, including not more than three (3) unrelated individuals. The term "unrelated individual" shall include any individual who is unrelated by blood, marriage or legal adoption to any other individual in the unit, but it

excludes domestic servants and minor foster children. The term "family" shall include a community residential program for not more than three (3) unrelated individuals, but shall not include a student home.

COMMUNITY RESIDENTIAL PROGRAM - An establishment, sometimes referred to as a community living arrangement or a group home, licensed by the Commonwealth of Pennsylvania, that provides a home for not more than eight (8) - handicapped individuals, excluding staff who do not reside on the property, who live and cook together as a single housekeeping unit. This definition shall not include a facility housing persons released from or under the jurisdiction of a government bureau of

corrections or similar institution.

"Handicapped" means, with respect to a person:

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act [21 U.S.C 802]).

STUDENT HOME - A living arrangement for students, unrelated by blood, marriage or legal adoption, attending or about to attend a college or university or who are on a semester or

summer break from studies a college or university, or any combination of such persons. Student homes shall not include fraternities, sororities or community residential programs.

Section 2. The Code of the Township of Lower Merion, Chapter 155 thereof, entitled Zoning, Article IV, RAA Residence Districts, §155-11, Use Regulations, Subsections D, F, M, O and P are repealed in their entirety.

Section 3. The Code of the Township of Lower Merion, Chapter 155 thereof, entitled Zoning, Article IV, RAA Residence Districts, §155-11, Use Regulations, shall be amended by adding thereto new subsections Q through U to read as follows:

Q. Community Residential Program.

R. Alternative housing options for the elderly when authorized as a special exception in accordance

with Article XXX of this chapter.

S. The following uses when authorized as a special exception:

(1) Club or lodge

(2) Fraternity or sorority

(3) Private educational institution

(4) Religious use or Hospital

(5) Student home for no more than three (3) students located in a dwelling with a floor area of at least one thousand five hundred (1500) square feet, exclusive of basements, garages and accessory buildings. A special exception authorizing a student home shall expire without further action by the township unless the use is registered in conformity with Title 92 of the Lower Merion

Code.

(6) Family day-care for no more than six (6) nonresident children (excluding children related to the caretaker by blood, marriage or legal adoption who live in the home) located in a single-family, detached dwelling in which the care-giver resides subject to the following additional requirements:

(i) No person except the resident care-giver (or an employee who the care-giver is required by law to have on the premises) shall work on the premises in connection with the use.

(ii) In no case shall family day-care be permitted on a lot with an area of less than ten thousand (10,000) square feet.

(iii) There shall be a minimum of forty (40) square feet of floor area per child, inclusive of the space occupied by furnishings and equipment but exclusive of closets, halls, bath rooms, kitchens and related areas, which shall be on the first floor of the dwelling.

(iv) A minimum of one hundred (100) square feet of outdoor play space per child shall be available on the same lot. Such play space shall be on the rear half of the lot, enclosed by a fence or wall and no less than 30 feet from any adjacent residential building.

(v) a driveway shall be required in order to allow off-street pick up and drop off of children.

T. No residential use authorized under subsections Q, R or S above shall be permitted if any other residential use listed in those subsections is located in any Residential Zoning District except R-7 and within 500 feet, measured by the shortest distance between the lot on which the proposed use will be located and the lot or lots which contain the existing use. Family day-care shall be considered a residential use. Student homes shall also be subject to the spacing provisions of Section 155-141.3.

U. In districts which have more than a single set of area and width regulations, community residential programs and student homes shall meet the area and width regulations for single-family dwellings, except that student homes are not permitted in structures designed as townhouses.

V. It is the intent of this Section

to make reasonable accommodations in the rules, policies and practices within this Township to afford all handicapped persons equal opportunity to use and enjoy a dwelling in satisfaction of the requirements of the Fair Housing Act (42 USCS §§3601, et. seq.) as amended. No provision of this Article shall require that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

Section 4. The Code of the Township of Lower merion, Chapter 155 thereof, entitled Zoning, Article XX, Off-street parking facilities, §155-95, Facilities required, shall be amended by the addition of subsection (V) and (W) to read as follows:

V. Non-recreational club or lodge, fraternity or sorority, convalescent home, nursing home or home for the aged: at least one (1) parking space for each seven hundred fifty (750) square feet of gross floor area or fraction thereof, exclusive of basements if not devoted to the use of patrons or residents.

W. Student homes three (3) parking spaces for each student home occupying a premises.

X. Community residential programs: at least two (2) parking spaces for each community residential program occupying a premises.

Section 5. The Code of the Township of Lower merion, Chapter 155 thereof, entitled Zoning, Article XXV, General Regulations, §155-133, Conversion of dwellings, subsection B thereof shall be amended in relevant part to read as

follows:

B. The Zoning Hearing Board may authorize as a special exception the conversation of a dwelling into a use described in §155-11 S (1), (2), (3) and (4) of this chapter, but only when the proposed use complies with the applicable requirements of this chapter and with the following requirements, which are in addition to the criteria and requirements set forth in §155-114 of this chapter:

* * * * * * * * * * *

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Section 6. The Code of the Township of Lower Merion, Chapter 155 thereof, entitled Zoning, Article XXX, Alternative Housing Options for the Elderly, Section 155-176, Specialized conversions,

subsection E and Section 155-177, Restricted accessory apartment, subsection F, shall be deleted and section 155-178, Group shared residences for the elderly, subsection G, shall be amended to read henceforth as follows:

§155-178 Group shared residences for the elderly.

G. A group shared residence for the elderly shall not be located near incompatible uses, such as heavy commercial or industrial areas.

Section 7. Nothing in this Ordinance or in Chapter 155 of the Code of the township of Lower Merion, as hereby amended, shall be construed to affect any suit or proceeding in any court, any rights acquired, or liability incurred, any permit issued, or any cause or causes of action existing under the said Chapter 155 prior

to the adoption of this amendment.

Section 8. The provisions of this Ordinance are severable, and if any section, sentence, clause, part, or provision thereof shall be held illegal, invalid, or unconstitutional by any court of competent jurisdiction, such decision of the court shall not affect or impair the remaining sections, sentences, clauses, parts or provisions of this Ordinance. It is hereby declared to be the intent of the Board that this Ordinance would have been adopted if such illegal, invalid, or unconstitutional section, sentence, clause, part, or provision had not been included herein.

Section 9. This Ordinance shall take effect and be in force from and after its approval as required by law.

Enacted into an Ordinance this 18th day of July, 1990.

TOWNSHIP OF LOWER MERION

_____

Charles F. Ward, President

ATTEST:

_____

Eileen R. Trainer, Secretary